UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/2001/26
5 July 2001

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Sub-Commission on the Promotion
and Protection of Human Rights
Fifty-third session
Item 6 of the provisional agenda

OTHER ISSUES

Smuggling and trafficking in persons and the protection of their human rights

Note by the Secretary-General

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GE.01-14462 (E) 260701

I. INTRODUCTION

1. In its decision 2000/110 of 18 August 2000, the Sub-Commission on the Promotion and Protection of Human Rights decided to include in the provisional agenda for its fifty-third session, under the agenda sub-item entitled "Freedom of movement: the right to leave any country, including one's own, and to return to one's own country, and the right to seek asylum from prosecution", a sub-item entitled "Smuggling and trafficking in persons and the protection of their human rights". The Sub-Commission also decided to request the Secretary-General to submit a relevant note on this subject to it at its fifty-third session. The present note is submitted in accordance with that resolution.

2. The Secretary-General welcomes the decision of the Sub-Commission to give attention to the human rights situation of smuggled migrants and trafficked persons. The present note seeks to define these two concepts, provide an overview of the human rights dimensions of trafficking and smuggling, summarize recent international and regional action on these issues, and identify areas in which further efforts are needed.

II. DEFINING TRAFFICKING AND MIGRANT SMUGGLING

3. Until recently, neither trafficking nor migrant smuggling were precisely defined in international law. In November, 2000, the General Assembly adopted the Convention against Transnational Organized Crime,[1] an international instrument aimed at promoting inter-State cooperation in order to combat transnational organized crime more effectively. The Convention is supplemented by three additional protocols, two of which were adopted at the same time as their parent instrument: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[2] (hereafter referred to as the Trafficking Protocol), and the Protocol against the Smuggling of Migrants by Land, Sea and Air[3] (hereafter referred to as the Migrant Smuggling Protocol). The Convention and two protocols were opened for signature in December 2000 at a high-level conference in Palermo, Italy.

4. The Trafficking Protocol is intended to "prevent and combat" trafficking in persons and to facilitate international cooperation against such trafficking. It provides for control and cooperation measures against traffickers. It also provides some measures to protect and assist victims. States parties to the Protocol are obliged to criminalize a range of trafficking-related offences. The Protocol is intended to cover cases of human beings being exploited by organized criminal groups where there is an element of duress and which have a transnational aspect, such as the movement of persons across a border or their exploitation within a country by a transnational organized criminal group.

5. The Protocol adopts a broad definition of trafficking, reflecting the wide range of means and end-purposes which characterize this type of activity. For the purposes of the Protocol, trafficking in persons is defined as:

> "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of

payments or benefits to achieve the consent of a person having control over another person for the purposes of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

The Protocol further states that the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth above.

6. The principle purpose of the Migrant Smuggling Protocol is to promote international cooperation to enhance the effective prevention, investigation and prosecution of migrant smuggling involving organized criminal groups. The Protocol defines migrant smuggling as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State party of which the person is not a national or a permanent resident".

7. The distinction that has been made between trafficked persons and smuggled migrants is a useful one. However, it is important to note that such a distinction is less clear on the ground, where there is considerable movement and overlapping between the two categories. The protocols determine that trafficked persons are to be granted protections additional to those accorded to smuggled migrants. Unfortunately, there is little guidance in either instrument regarding how the identification process is to be undertaken and by whom. This is especially important because identifying an individual as a trafficked person carries different responsibilities for a State party than is the case if that person is identified as a smuggled migrant. It is hoped that States parties will address such issues in the near future.

III. THE HUMAN RIGHTS DIMENSIONS OF HUMAN TRAFFICKING AND MIGRANT SMUGGLING

8. The human rights dimensions of trafficking are well recognized. However, the issue of migrant smuggling is usually addressed within the framework of migration control or transnational organized crime. The following paragraphs provide a brief overview of some of the key rights issues associated with both phenomena.

9. Trafficking and related practices such as debt bondage, forced prostitution and forced labour are violations of the most basic human rights, including the right to life, the right to dignity and security, the right to just and favourable conditions of work, the right to health and the right to equality. These are rights, which are recognized as belonging to all persons, irrespective of their sex, nationality, social status, occupation or other difference.

10. Trafficking is inherently discriminatory and provides an example of the way in which multiple discrimination operates. Each year, millions of women and children are tricked, sold, coerced or otherwise forced into situations of exploitation from which they cannot escape. Racial, ethnic and gender discrimination deny basic life choices to many of the world's women and girls. It is because of their precarious legal, social and economic situation, that women are so vulnerable to trafficking and other forms of exploitation. Because the overwhelming majority

of trafficked persons are female, trafficking is usually considered to be the result of discrimination on the basis of sex. However, there is increasing evidence that racial and social marginalization constitute significant risk factors for trafficking and also determine the treatment that trafficked women experience in countries of destination. In addition, racist ideology and racial, ethnic and gender discrimination underlie the demand for the products of trafficking.

11. While the precise obligations of States towards victims of trafficking is yet to be determined, the existence of such obligations has been widely acknowledged. It is clear, for example, that victims of human rights violations such as trafficking should be provided with access to adequate and appropriate remedies.[4] At a minimum, States should be obliged to provide information to trafficking victims on the possibility of obtaining remedies, including compensation for trafficking and other criminal acts to which they have been subjected, and to render assistance to such victims, giving particular attention to the special needs of children to enable them to obtain the remedies to which they are entitled.

12. The issue of repatriation of victims of trafficking is a sensitive and controversial one. The High Commissioner for Human Rights has expressed the view that "safe and, as far as possible, voluntary return must be at the core of any credible protection strategy for trafficked persons. A failure to [provide] for safe (and to the extent possible) voluntary return would amount to little more than an endorsement of the forced deportation and repatriation of trafficked persons. When trafficking occurs in the context of organized crime, such an endorsement presents an unacceptable safety risk to victims".[5] At a minimum, it would appear that the identification of an individual as a trafficked person should be sufficient to ensure that immediate expulsion which goes against the will of the victim does not occur and that necessary protection and assistance is provided. Special attention must be given to the situation of trafficked children - from protecting and ensuring all their rights such as education and health care, to location of their families, as well as ensuring sensitive and appropriate measures are taken to reconcile the child with their family.

13. The vulnerability of migrants, in particular irregular migrants, as a result of their precarious situation in society often leads to violations of their most basic human rights. Almost invariably, smuggled migrants are also victims of criminal exploitation in their countries of origin and/or transit countries and/or countries of reception. That status renders such persons even more susceptible to further exploitation. There is a clear need to ensure that the individuals falling victim to these practices are protected and that measures taken to prevent migrant smuggling also seek to uphold the fundamental human rights to which all persons, including smuggled migrants, are entitled.

14. In this context, it is essential to acknowledge that increasing numbers of asylum-seekers and refugees are being transported by means which fall within the definition of migrant smuggling quoted in paragraph 6 above. The principle of non-refoulement, which is the core of international refugee protection, as well as other international protection responsibilities, must be explicitly upheld in such situations. It is encouraging to note that the Migrant Smuggling Protocol goes some way towards protecting the rights of persons in need of international protection, through the inclusion of a reference to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto, including the principle of non-refoulement. These

instruments also offer a useful legal framework for the adoption of additional safeguards for the protection of smuggled asylum-seekers and refugees. Finally, the illegality of entrance into, or presence on, the territory of a State should not adversely affect a person's claim for asylum. Smuggled migrants should be given full opportunity (including through the provision of adequate information) to make a claim for asylum or to present any other justification for remaining in the country.

15. Human rights violations - including violations of economic and social rights - are also important root causes of both trafficking and migrant smuggling. Studies which have examined the causes of migration reveal that discriminatory treatment and violations of basic economic and social rights are important (and often overriding) motivations - particularly for irregular migrants. Increasingly restrictive immigration policies on the part of the major destination countries also contribute to forcing potential migrants into accepting illegal and dangerous immigration arrangements.

IV. INTERNATIONAL AND REGIONAL INITIATIVES ON TRAFFICKING AND MIGRANT SMUGGLING

16. In his most recent reports to the General Assembly (A/55/322) and the Commission on Human Rights (E/CN.4/2001/72) on this subject, the Secretary-General outlined the ways in which the various components of the United Nations human rights system are addressing the trafficking phenomenon. This issue is now being taken up regularly by the General Assembly, the Commission on Human Rights, the Commission on the Status of Women, the human rights treaty bodies (particularly the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women) and other human rights mechanisms, such as the Special Rapporteur on violence against women, the Special Rapporteur on the sale of children, child prostitution and child pornography and the Special Rapporteur on the human rights of migrants. The High Commissioner for Human Rights has identified trafficking as a priority issue and her Office has developed a comprehensive programme which seeks to ensure the integration of a human rights perspective into national, regional and international anti-trafficking initiatives. The High Commissioner has recognized the close connection between trafficking and other abusive migration practices such as smuggling.

17. The Sub-Commission on the Promotion and Protection of Human Rights addresses the issue of trafficking in persons through the activities of the Working Group on Contemporary Forms of Slavery. The Working Group gave priority consideration to the issue of trafficking in persons at its twenty-fourth session (1999) and subsequently decided to devote its twenty-sixth session (June 2001) to the follow-up of progress made to combat trafficking in persons, with an emphasis on women and children. At each of its sessions, the Working Group adopts specific recommendations on trafficking in persons and receives regular information from participants, in particular non-governmental organizations. The Working Group collaborates closely with the Voluntary Trust Fund on Contemporary Forms of Slavery, which provides travel and project grants to NGOs working on the trafficking issue.

18. Information on how other parts of the United Nations system, other international organizations, regional organizations, non-governmental organizations and individual Governments are dealing with the trafficking issue can be found in the two reports of the

Secretary-General referred to above. These reports also contain information on anti-trafficking activities and programmes of the regional organizations, the International Organization for Migration, the Office of the United Nations High Commissioner for Refugees (UNHCR), the International Labour Organization (ILO), the United Nations Development Programme, the United Nations Children's Fund and the Centre for International Crime Prevention.

19. The question of migrants and the specific issue of the rights of migrants are on the agenda of a number of United Nations bodies (including the General Assembly and the Commission on Human Rights). Of particular note is the 1999 decision of the Commission on Human Rights to establish a special rapporteur on the human rights of migrants. The Special Rapporteur reported to the Commission in 2000 and 2001 and has indicated that the issue of smuggled migrants is a priority area of concern. Overall, however, and in terms of the international human rights system as a whole, very little attention has been paid thus far to the problem of smuggled migrants and protection of their rights.

VI. PRIORITY AREAS FOR ACTION

20. Today, one in every 50 human beings is a migrant worker, a refugee or asylum seeker, or an immigrant living in a "foreign" country. Current estimates by the United Nations and the International Organization for Migration indicate that some 150 million people live temporarily or permanently outside their countries of origin. According to figures released by ILO, more than half of this number are migrant workers and members of their families. Another 13 million are recognized as refugees by UNHCR.

21. Migration and the "multiculturalization" of societies around the world are facts of history and increasingly predominant features of this contemporary age of globalization. Increasing migration, for positive and negative reasons, means that nearly all States have become or are becoming more multi-ethnic, multi-cultural, multi-racial, multi-religious and multi-lingual. Addressing this reality of increasing diversity means finding political, legal, social and economic mechanisms to ensure mutual respect and to mediate relations across differences.

22. As overall migration increases, the incidence and severity of abusive forms of migration such as trafficking and migrant smuggling have escalated. A growing number of migrants, of all categories, are being trafficked or smuggled across national borders. By definition, trafficked persons are victims of serious and systemic human rights violations. Smuggled migrants are often fleeing human rights violations and their precarious situation makes them particularly vulnerable to further abuse. International action to protect the rights of individuals caught up in abusive migration practices is therefore a priority.

23. It is a fact that trafficking and migrant smuggling are being increasingly dealt with in the context of transnational organized crime, law enforcement and border control. Efforts to apprehend and punish traffickers and smugglers should of course be encouraged and supported. However, it is essential to acknowledge that the growth in trafficking and smuggling networks is a direct consequence of the discordance between the number of persons who wish (or are forced)

to migrate and the legal opportunities for them to do so. While such discordances remain, it will be difficult to address trafficking and migrant smuggling in any meaningful way. States of destination should therefore be encouraged to review their immigration policies and to develop greater opportunities for lawful and mutually beneficial migration.

24. Good laws, strong law enforcement and improved cooperation between States will, individually and collectively, help to prevent trafficking and migrant smuggling. However, additional prevention strategies, developed on the basis of an understanding of the motivations behind trafficking and smuggling are also necessary. The underlying factors which force individuals to seek and accept dangerous and illegal migration arrangements, including poverty, discrimination, corruption and inequality between countries, should also be openly and honestly addressed. Failure to come to terms with these (admittedly more difficult) issues will prevent other anti-trafficking and anti-smuggling efforts from achieving any significant success.

25. The connection between human rights and abusive forms of migration such as trafficking and migrant smuggling makes it especially important that the international human rights community, including the Sub-Commission on the Protection and Promotion of Human Rights, take up this issue with full force and vigour. The human rights community has a special responsibility to ensure that the trafficking and migrant smuggling issues are not simply reduced to problems of migration, problems of public order or problems of organized crime. These perspectives, are of course, valid and important. However in developing realistic and durable solutions we must be prepared to look further - to the rights and the needs of the individuals involved.

Notes

[1] General Assembly resolution 55/25, of 15 November 2000, annex I.

[2] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, General Assembly resolution 55/25, annex II.

[3] Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, General Assembly resolution 55/25, annex III.

[4] A/AC.254/27, para. 7.

[5] A/AC.254/16, para. 7